

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4406

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS CORTES GONZALEZ, a/k/a Luis,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Glen E. Conrad, District Judge. (5:07-cr-00063-GEC-JGW-4)

Submitted: February 24, 2011

Decided: March 14, 2011

Before WILKINSON and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Michael T. Hemenway, THE LAW OFFICES OF MICHAEL T. HEMENWAY, Charlottesville, Virginia, for Appellant. Donald Ray Wolthuis, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jose Luis Cortes Gonzalez pled guilty to conspiracy to manufacture, to distribute, and to possess with intent to distribute cocaine HCL, cocaine base, and methamphetamine (Count 1), in violation of 21 U.S.C. § 846 (2006), and using and carrying a firearm during or in relation to a drug trafficking crime (Count 69), in violation of 18 U.S.C. § 924(c) (2006). Gonzalez was sentenced to consecutive mandatory minimum terms of imprisonment of 120 months on Count 1 and 60 months on Count 69, for a total sentence of 180 months.

On appeal, Gonzalez argues that he was improperly convicted on Count 69 and that if that conviction is vacated, his sentence on Count 1 is flawed because without the conviction on Count 69, he would have met the qualifications for the "safety valve" provisions of 18 U.S.C. § 3553(e) (2006) and U.S. Sentencing Guidelines Manual § 5C1.2 (2007), and thus may have received a sentence below the otherwise applicable statutory minimum term of 120 months.

The United States has filed a motion to vacate Gonzalez's conviction and sentence on Count 69 and to remand to the district court for further proceedings. Gonzalez concurs in this disposition of Count 69.

Upon consideration, the court grants the Government's motion to vacate Gonzalez's conviction and sentence on Count 69,

and to remand to the district court for further proceedings as may be appropriate. In addition, we affirm Gonzalez's conviction on Count 1. To preserve the rights of both Gonzalez and the Government as to Gonzalez's sentence on Count 1, however, we further vacate Gonzalez's sentence on Count 1, and remand with instructions that Gonzalez is to be resentenced as to Count 1 after the Government has had a reasonable opportunity to determine whether to pursue further charges against him.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED